STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND HENRY ANDRES, by and through his guardian MARK KEVIN PHILLIPS, Plaintiff-Appellee, v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant.	UNPUBLISHED January 5, 2010 No. 279608 Wayne Circuit Court LC No. 04-411019-NF ON REMAND

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

This case returns to this Court on remand from our Supreme Court "for consideration of the defendant's [fraud] argument that the trial court erred in granting summary disposition for the plaintiff and enforcing the parties' attendant care services agreement." *Andres v State Farm Mut Auto Ins Co*, __ Mich ___; 773 NW2d 20 (2009). After such consideration, we reverse the trial court's grant of summary disposition in plaintiff's favor and remand the matter to the trial court for entry of order dismissing plaintiff's case.

Our previous opinion set forth the following relevant facts:

> Raymond Henry Andres suffered a severe brain injury in a motor vehicle accident on July 17, 2002. He thereafter required 24-hour attendant care. At some point in 2003, Lori Andres, Raymond's former wife and guardian, entered into an attendant care services agreement with defendant, Raymond's no-fault insurance carrier, for his care. The agreement specified the hourly amounts to be paid for certain enumerated services, but did not specify the number of hours that each service was to be rendered. Defendant initially made monthly payments in the amount of $18,648. On April 13, 2004, plaintiff filed this action to enforce the agreement after defendant refused to continue making monthly payments in this amount.
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> Plaintiff moved for summary disposition to enforce the agreement, and, in response, defendant argued that the agreement was procured through fraud by Linda S. Swagler, defendant's claim representative, and Mark L. Silverman, plaintiff's attorney. Defendant asserted similar allegations of fraud against

> Swagler and Silverman in a counterclaim filed in a different action commenced in the United States District Court for the Eastern District of Michigan. In the instant case, the trial court granted summary disposition for plaintiff, ruling that the agreement is enforceable regardless of whether Swagler and Silverman engaged in fraud because there is no indication that Lori Andres, who signed the contract on Raymond's behalf, was involved in the alleged fraudulent conduct, and because Swagler had ostensible authority to enter into the agreement. [*Andres v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2008 (Docket No. 279608).]

Defendant appealed to this Court, arguing that the trial court erred by granting summary disposition for plaintiff and enforcing the agreement because it was procured through fraud. A majority of this Court held that defendant waived the defense of fraud by failing to assert it as an affirmative defense. *Id*. Our dissenting colleague disagreed that the defense was waived. A majority of our Supreme Court agreed with this dissenting opinion, and remanded the matter for our further review. Thus, we turn to defendant's argument.

Defendant argues on appeal that the attendant care services agreement was unenforceable because it was procured through fraud. Since this issue was last before us, a final decision has been rendered in the above-referenced counterclaim that defendant filed in the associated federal case. *Rivet v State Farm Mut Auto Ins Co*, No. 04-CV-72333 (ED Mich, April 19, 2007), aff'd 316 Fed Appx 440 (CA 6, 2009), cert den ___ US ___; 130 S Ct 198; ___ L Ed 2d ___ (No. 09-17, October 5, 2009). In that case, an insured sued the instant defendant for benefits who in turn sued its claims representative and the attorney involved in this case for fraud, breach of fiduciary duty, and a declaratory judgment, with regard to that case, the instant case, and other cases. The federal district court found in favor of this defendant and against its claims adjustor and this plaintiff's attorney. *Id*. at 2. The federal district court's judgment includes, in connection with the request for declaratory judgment, a finding "in favor of . . . State Farm . . . and against . . . Lori Andres, as former Guardian, and Mark Phillips, as Successor Guardian, and declares that the Agreement is null and void from inception." *Id*. at 3 (parenthetical record citation omitted). There is no dispute that the "Agreement" referred to in the federal district court's judgment is the attendant care services agreement at issue in this case.

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006), citing 1 Restatement Judgments, 2d, § 27, p 250. For this purpose, "A decision is final when all appeals have been exhausted or when the time available for an appeal has passed." *Leahy*, *supra* at 530. In this case, a valid final judgment declares that the attendant care services agreement at issue was void from its inception; thus, collateral estoppel bars relitigation of the issue. The agreement is not now, and never was, valid. Nevertheless, the issue remains whether plaintiff, who was not found to be involved in the fraud, may obtain the benefit of the contract, i.e., whether defendant is still bound by its terms with respect to plaintiff. We answer in the negative.

Although plaintiff was not involved in the fraud, his attorney perpetrated the fraud on plaintiff's behalf, and for plaintiff's benefit. Agency principles apply to the attorney-client relationship and impute the actions of an attorney to the client. See *Everett v Everett*, 319 Mich

475, 482-483; 29 NW2d 919 (1947); see, also, *Link v Wabash R Co*, 370 US 626, 633-634; 82 S Ct 1386; 8 L Ed 2d 734 (1962). "[A]n attorney often acts as his client's agent, and his authority may be governed by what he is expressly authorized to do as well as by his implied authority." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004). Here, plaintiff admits that his attorney was to represent him with respect to his no-fault claim against defendant. Thus his attorney was authorized to negotiate an attendant care services agreement on his behalf. In that capacity, plaintiff's attorney fraudulently procured the attendant services contract at issue. Plaintiff may not benefit from his attorney's fraudulent actions which were perpetrated on plaintiff's behalf. See *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001); *Everett*, *supra*. Accordingly, the attendant care services agreement, that was declared null and void from inception, is an unenforceable nullity.

Reversed and remanded to the trial court for entry of an order dismissing this action. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter